Supreme Court, U.S.
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No. 99-376

In The

Supreme Court of the United States

DAVID C. SINGLETON,

Petitioner,

vs.

DON CECIL, HARLEY MOYER, IVAN PARKER, KEVIN TIDWELL, DELLA PRICE, and CITY OF ADVANCE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner has not stated correctly to this Court the real question presented for consideration by the Court. Petitioners argue that the question presented is as follows: "Does the discharge of a police officer by city officials deny him the right to substantive due process where the decision was based solely on the fact that his wife made a remark about the chief of police during a private conversation with her daughter?" As briefed, and argued, to the Eighth Circuit Court of Appeals En Banc, the proper question for this Court to consider is as follows:

> Where a municipal, at-will employee has no acknowledged constitutionally protected interest in his employment under applicable state law, is the decision to discharge the employee for undisclosed reasons entitled to federal judicial review in a 42 U.S.C. § 1983 claim of a violation of the substantive due process clause of the Fourteenth Amendment to the Constitution?

A review of the well-reasoned decision rendered by the Eighth Circuit Court of Appeals En Banc (Petitioner's Appendix, 1a-19a) confirms that this question, properly considered, does not warrant the grant of certiorari by this Court.

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STATEMENT OF THE CASE

The Petitioner has incorrectly stated facts placed before the District Court as well as the Eighth Circuit Court of Appeals and the procedural history of this case. (Compare Petitioner's statement to that of the Eighth Circuit, Appendix 2a-4a). For this reason, Respondents will provide a more complete statement of the facts before the Eighth Circuit Court of Appeals En Banc and the procedural history of this case.

1. FACTUAL BACKGROUND

Petitioner David Singleton worked for the City of Advance, Missouri as a police officer from 1990 until his termination in 1994. The City of Advance did not have a written employment agreement with the Petitioner. Petitioner's employment was terminable at will, either by the mayor with approval of a simple majority of the city council, or by two-thirds vote of the city council. *See Revised Missouri Statutes*, Section 79.240 R.S.Mo. (1994); *State ex rel. Lupo vs. City of Wentzville*, 886 S.W.2d 727, 730-31 (Mo. Ct. App. 1994). Neither state law nor local law limited the reasons for which the Petitioner could be discharged nor afforded him the right to a hearing in connection with his discharge. At the time of Petitioner's discharge, Defendants Harvey Moyer, Ivan Parker, Kevin Tidwell and Della Price were members of the City Council for the City of Advance and Defendant Don Cecil was the chief of police for the City of Advance ("Respondents"). William Bradshaw, the mayor of the City of Advance, was not a named defendant in this action.

Petitioner, during the period of his employment, believed that he had information that Don Cecil had abused an incentive program designed to facilitate government purchases by purchasing a car for his own benefit and use under the program. Petitioner believed that Respondent Cecil had engaged in illegal activity but Petitioner never notified any law enforcement official, the mayor, or the city council concerning his beliefs. On the morning of March 8, 1994, Petitioner's wife, Joann, called their daughter, Sabrina, on a cordless phone and began discussing Respondent Cecil. During the conversation Petitioner's wife said she wanted to "set up" Respondent Cecil by hiring someone to bribe him. This statement, on the cordless phone, was recorded by a local private investigator not employed by the City who happened to be scanning radio frequencies at the time for his own entertainment. Thereafter, the local private investigator contacted Respondent Cecil and Mayor Bradshaw and played the recorded conversation for them and also gave Respondent Cecil a copy of the recording. Respondent Cecil then visited the members of the City Council and played the recording for them individually. Each council member recognized the voices of Petitioner's wife and daughter on the recording. In a special meeting on March 11, 1994, Respondent council members voted to terminate Petitioner's employment with the City. Respondents did not give Petitioner a reason for termination in his

termination letter and did not publicly divulge any reason for his discharge. (Appendix, 2a-4a).[1]

2. PROCEDURAL HISTORY

Petitioner initiated a lawsuit against the Respondents under 42 U.S.C. Section 1983 alleging that his termination violated his rights of free speech, due process, intimate association and privacy. The alleged violation of free speech rested on the premise that Petitioner was discharged in an effort to keep him silent concerning Respondent Cecil's car purchase. In response and during the litigation, the Respondents divulged that they based the termination decision on Joann's plot to bribe Respondent Cecil. The District Court granted summary judgment in favor of all of the Respondents on all of the Petitioner's claims. In particular, the District Court concluded that the Petitioner could not prevail on his free speech claim because he could not demonstrate any causal connection between Respondent Cecil's car purchase and his termination. *See Singleton vs. Cecil*, 955 F.Supp. 1164, 1166-67 (E.D. Mo. 1997) (Appendix, 56a-62a, at 60a). The District Court found that the Petitioner could not prevail on any procedural due process claims because, as an employee at will, he had no liberty or property interest in his job. *See Id.* at 1167 (Appendix, 61a). The District Court also found that Petitioner's claims that he was deprived of his rights of intimate

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[1] All cites to the "Appendix" will be cites to Petitioner's Appendix attached to the Petition.

association and marital privacy failed because the evidence indicated that "the Defendants had a legitimate, good faith belief that Plaintiff, with his family, was engaging in improper conduct by conspiring to bribe the Chief of Police." *Id.* (Appendix, 62a).

Petitioner appealed the District Court's decision to the Eighth Circuit Court of Appeals. On appeal, Petitioner appealed only the District Court's determination that the Respondent City did not violate his substantive due process right of privacy in his marital relationship and his First Amendment right of intimate association. (Appendix, 50a). In a well-reasoned opinion (Appendix, 46a-53a), Judge Magill found that the Respondent City of Advance's termination of the Petitioner did not directly or substantially interfere with Petitioner's right to be married when they terminated him on the basis of his wife's recorded statement threatening to frame the police chief. Particularly, the court noted "Singleton presented no evidence that his termination 'significantly discouraged, let alone made' practically impossible," his marriage to Joann Singleton. (Appendix, 52a). Based upon the evidence and the fact that no evidence was presented showing that the Respondent City acted with the goal of poisoning the Petitioner's marriage, the Eighth Circuit Court of Appeals affirmed the District Court's grant of summary judgment by holding that Petitioner's termination did not violate Petitioner's right of substantive due process right of privacy in his marital relationship. (*Id.* at 52a-53a). Judge Richard S. Arnold, dissenting in that opinion (Appendix, 53a-55a), agreed with the court's holding that Petitioner failed to establish a violation of the due process clause of the Fourteenth Amendment

particularized as a right of intimate association and marital privacy. (Appendix, 53a). Petitioner filed a Petition For Rehearing which was granted by the panel of the Eighth Circuit Court of Appeals hearing the case.

In the second decision (Appendix, 28a-40a), the panel of the Eighth Circuit Court f Appeals reaffirmed the holding in the original opinion that held that Petitioner's discharge did not violate the Petitioner's right to intimate association and marital privacy. (Appendix, 31a). However, Judge Arnold, writing for the new majority, held that Petitioner's discharge was solely because of statements made by his wife, and that the dismissal was arbitrary, capricious and violative of the substantive due process clause of the Constitution. The new majority of the panel therefore reversed the District Court's judgment in favor of the Respondents. (Appendix, 31a). In reaching their conclusion, Judge Arnold found that Petitioner had a protected fundamental occupational liberty interest protected by the substantive due process clause of the Constitution. (Appendix, 34a-39a). Judge Magill dissented. (Appendix, 40a-45a). Respondents then filed a Petition For Rehearing to the panel and/or to the court en banc which was granted by the Eighth Circuit Court of Appeals En Banc.

After oral argument, the Eighth Circuit Court of Appeals En Banc, in a well-reasoned opinion written by Judge Magill (Appendix, 1a-19a), held "following the analysis of our sister circuits and Supreme Court precedent, we affirm the District Court's holding that, in Missouri, an at-will employment state, a discharged municipal at-will employee does not have a Section 1983 substantive due process occupational liberty interest

under the Fourteenth Amendment." (Appendix, 1a, 2a). The Eighth Circuit Court of Appeals En Banc also held that Respondents did not violate the Petitioner's substantive due process right of privacy in his marital relationship and his First Amendment right of intimate association in the discharge of his employment as found by the district court and all opinions considering this issue (Appendix, 7a, 8a),[2] and affirmed the judgment of the district court. (Appendix, 18a-19a). It is from this en banc decision that Petitioner now seeks a Writ of Certiorari from this Court.

REASONS FOR DENYING THE WRIT

1. **The Petition does not present any issue as to which there is a conflict of decisions among the circuits or which constitutes an important or substantial question of federal law as required by Rule 10 for this Court to grant certiorari.** Petitioner cites no cases holding otherwise. The circuit court decisions are in strong agreement concerning the core issues presented by the Petition and this Court's decisions support the approach taken in the respective circuits. Because the Petition does not and cannot establish the requirements of Rule 10, the Eighth

[2] Each Panel of the Eighth Circuit Court of Appeals, as well as the Eighth Circuit Court of Appeals En Banc, all held that Petitioner had failed to present any evidence that his substantive due process right of privacy in his marital relationship and his First Amendment right of intimate association were violated by the Respondents when the Petitioner was discharged.

Circuit Court of Appeals decision *en banc* does not merit further review by this Court.

2. **The Petitioner's invitation to this Court to extend substantive due process protection to municipal at-will employees who are allegedly terminated for arbitrary and capricious reasons is not supported by precedent of this Court and could lead to inappropriate federal intervention in state employment matters.** "[A]s a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." *Collins vs. City of Harker Heights, Texas,* 503 U.S. 115, 125 (1992). Since the due process clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society", *Daniels vs. Williams,* 474 U.S. 327, 332 (1986), this Court has rejected claims that the due process clause should be interpreted to impose federal duties that are analogous to ones traditionally imposed by state tort law. *Collins,* 503 U.S. at 128. Likewise, the Court has found that "[T]he reasoning in those cases applies with special force to claims asserted against public employers because state law, rather than the Federal Constitution, generally governs the substance of the employment relationship." *Id.* (quotations omitted). Based upon these principles, this Court should not elevate state-defined employment rights of municipal at-will employees to fundamental rights protected by the substantive due process clause of the Fourteenth Amendment.

The creation of a new federal tort under the Constitution for this type of review of state employment decisions

would not only supplant Missouri tort law, but would create a cause of action overruling controlling Missouri state law. Petitioner concedes in his Petition that he was an "employee at will" under Missouri state law with no employment contract (Petitioner's Petition, p. 2) and, as such, Petitioner had no property interest under state law protected by the due process clause. *See Cooper vs. City of Creve Coeur*, 556 S.W.2d 717, 721 (Mo. Ct. App. 1977); *Bishop vs. Wood*, 426 U.S. 341, 344 and n.7 (1976). In Missouri, the rule is well-established "that in an absence of a contract for employment for a definite term or a contrary statutory provision, an employer may discharge an employee at any time, without cause or reason, or for any reason, and in such cases no action can be obtained for wrongful discharge." *Christy vs. Petrus*, 295 S.W.2d 122, 124 (Mo. banc 1956). As an employee at will in Missouri, Petitioner could be discharged with cause or without cause, *Dake vs. Tuell*, 687 S.W.2d 191, 193 (Mo. 1985), and could be discharged for no reason or for an arbitrary or irrational reason. *Shawcross vs. Pyro Prods., Inc.*, 916 S.W.2d 342, 343 (Mo. Ct. App. 1995) (quotations omitted).

The expansion of the substantive due process clause to provide review of alleged arbitrary and capricious employment decisions would destroy the employment at will doctrine in Missouri as described above and lay down new rules of conduct to regulate liability for state employment decisions. This in turn would create a constitutional right to work in Missouri and other states in the Eighth Circuit with no guideposts for responsible decision making by either public employers and/or reviewing federal courts. This type of holding would force

federal courts to set as a "super-personnel department . . . second-guessing the wisdom of . . . personnel decisions", *see Hill vs. St. Louis Univ.*, 123 F.3d 1114, 1120 (8th Cir. 1997) (quotations omitted), and grant federal review of any adverse employment decision relating to state employees. Such a policy would be in contravention of this Court's philosophy that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Bishop*, 426 U.S. at 349.[3] This Court should follow its teachings that "[T]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field", *Collins*, 503 U.S. at 125, and deny the Petitioner's Petition because the state employment relationship should be governed by state law and not newly branded rights created under the Constitution contrary to state law.

3. **The creation of this new federal tort for judicial review of alleged employment decisions made arbitrarily and capriciously would not be consistent with this Court's opinions**. This Court has consistently held that a public employer may discharge an at-will employee for no reason, or even a bad reason, without

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[3] This type of decision would not only grant employees at will federal review of employment decisions under substantive due process in contravention of Missouri state law, but would also grant the employee the right to a hearing under the procedural due process clause without the required showing of a deprivation of a life, liberty or property interest as required by the Fourteenth Amendment and in contravention of this Court's decisions. *See Board of Regents of State Colleges vs. Roth*, 408 U.S. 564 (1972).

running afoul of the due process clause. In *Cafeteria & Restaurant Workers Union, Local 473 vs. McElroy*, 367 U.S. 886, 896 (1961), the Court explained that it "has consistently recognized that . . . the interest of a government employee in retaining his job can be summarily denied" and "[i]t has become a settled principle that government employment, in the absence of legislation, can be revoked at . . . will." Likewise, in *Codd vs. Velger*, 429 U.S. 624, 628 (1977), this Court held "[s]ince the District Court found that the plaintiff had no Fourteenth Amendment property interest in continued employment, the adequacy or even the existence of reasons for failing to rehire him presents no federal constitutional question." (Footnote omitted). Similarly, in *Bishop vs. Wood*, 426 U.S. 341, 348-50 (1976), the court noted that even if the employer's reasons for discharging the employee were false, the employee still could not state a due process claim.

4. **The Eighth Circuit Court of Appeals' opinion is consistent with other circuits' decisions refusing to allow discharged municipal employees to challenge their discharge under the substantive due process clause.** In *McKinney vs. Pate*, 20 F.3d 1550 (11th Cir. en banc 1994), *cert. denied, McKinney vs. Osceola County Bd. Of County Com'rs.*, 513 U.S. 1110 (1995), the Eleventh Circuit considered the issue of "whether, under the Fourteenth Amendment, a government employee possessing a state created property interest in his employment states a substantive due process claim rather than a procedural due process claim when he alleges that he was deprived of that employment interest by an arbitrary and capricious nonlegislative government action." *Id.* at 1553. After analyzing Supreme Court precedent, the *McKinney* court

determined that public employment law had been found to be outside the scope of substantive due process jurisprudence by this Court and in denying the employee's claim found that "employment rights are not 'fundamental rights created by the Constitution.' " *Id.* at 1553, 1556 and 1560. In *Lum vs. Jensen*, 876 F.2d 1385, 1389 (9th Cir. 1989), the Ninth Circuit found "no clearly established constitutional right to substantive due process protection of continued public employment." Similarly, the Sixth Circuit in *Holthaus vs. Board of Education*, 986 F.2d 1044 (6th Cir. 1993) held that a public employee's claim for improper discharge did not give rise to a substantive due process claim even when the public employee claimed that the discharge was motivated by an allegedly improper racial remark. *Id.* The Seventh Circuit also has held that claims for substantive due process protection against arbitrary and capricious termination from public employment must be based upon the "existence of a protected life, liberty or property interest" and specifically found that "occupational liberty is not protected by substantive due process." *Zorzi vs. County of Putnam*, 30 F.3d 885, 894-5 (7th Cir. 1994). *Cf. Santiago de Castro vs. Morales Medina*, 943 F.2d 129, 131 (1st Cir. 1991) (plaintiff's alleged "right to pursue her employment free from emotional health risks resulting from her supervisor's verbal harassment [does not] warrant substantive due process protection under the United States Constitution"). Each of these circuit decisions, as well as the decision by the Eighth Circuit Court of Appeals in this case, relied upon Supreme Court precedent in making the determination that the discharge of a public employee was not entitled to substantive due process protection.

5. **The Petitioner in this case did not have a life, liberty or property interest in his employment protected by the due process clause of the Fourteenth Amendment.** Petitioner's claim was brought pursuant to 42 U.S.C. § 1983 which requires Petitioner to prove that some person, acting under the color of state law, deprived him of rights protected by the Constitution. *See* 42 U.S.C. § 1983. Petitioner, as a threshold matter, was required to show a deprivation of life, liberty or property to support a due process claim. *See Nunez vs. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998). In this case, Petitioner, as an employee at will under Missouri state law, had no property interest in his employment. *See Cooper vs. City of Creve Coeur*, 556 S.W.2d 717, 721 (Mo. App. 1977). As the Eighth Circuit Court of Appeals properly found, the Petitioner also had no occupational liberty interest deserving protection by the due process clause. (Appendix, 10a-15a).

Petitioner was terminated from his employment by the Respondents and was not given a reason for his termination to create any liberty interest in his employment. The termination in this case was similar to the termination of the professor in *Board of Regents of State Colleges vs. Roth*, 408 U.S. 564 (1972). In *Roth*, this Court held that no liberty interest was created where a decision not to re-employ the teacher imposed upon the teacher no stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. *Id.* at 573. This Court noted, "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he [is discharged from] one job but remains as free as before to seek another." *Id.* at 575. As in *Roth*, the Petitioner in

this case was not stigmatized in any manner since the reasons for his termination were not publicized or placed in his letter of termination. Nor was the Petitioner prevented in any manner from accepting other jobs in his "chosen field of employment" which ability has been protected by the Court's decisions. *See Conn vs. Gabbert*, 67 U.S. L.W. 4222, 4224 (U.S. 1999); *Schware vs. Board of Bar Exam'rs.*, 353 U.S. 232, 246-47 (1957).[4]

6. **The two panels of the Eighth Circuit and the Eighth Circuit Court of Appeals En Banc correctly decided that the Respondent's termination of Petitioner did not violate his substantive due process right of privacy in his marital relationship.** In this case, Petitioner presented no evidence that his termination "significantly discouraged, let alone made 'practically impossible,' " his marriage to his wife. *See Zablocki vs. Redhail*, 434 U.S. 374, 387 n.12 (1977). Petitioner also presented no evidence that the Respondents acted with any goal of poisoning his marriage or affecting his marriage in any manner. *Cf. Morfin vs. Albuquerque Pub. Sch.*, 906 F.2d 1434, 1440 (10th Cir. 1990). More importantly, Petitioner presented no evidence that the decision of the Respondents to terminate him on the basis of his wife's conduct substantially or directly interfered with his right to enter and maintain his marital relationship. *See Zablocki*, 434 U.S. at 387. Without this type of evidence, Petitioner could not state any claim for a substantive due process violation based upon his right of privacy in his

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[4] Disclosure to Petitioner of the reason for his discharge during the litigation does not constitute the required disclosure to create a liberty interest. *See Bishop*, 426 U.S. at 348.

marital relationship and/or his right of intimate association with his wife. (*See* Appendix, 51a, 52a and 53a).

The cases cited by Petitioner are not inconsistent with these holdings by the Eighth Circuit courts. In *Montgomery vs. Carr*, 101 F.3d 1117 (6th Cir. 1996), the court was asked to decide whether an anti-nepotism policy infringed upon the plaintiff's right of association in marriage when the evidence indicated the plaintiff was transferred because of her marriage. In *Adkins vs. Board of Education of Magoffin County, Ky.*, 982 F.2d 952 (6th Cir. 1993), the evidence was sufficient to support a jury determination that the defendant refused to recommend the plaintiff for continued employment because of her marriage to her husband. As distinguished from Petitioner's claim, the evidence in these two cases indicated that the plaintiff had been deprived of her public employment for exercising a constitutional right, i.e. being married to a particular individual. Similarly, in *Morfin vs. Albuquerque Pub. Sch.*, 906 F.2d 1434 (10th Cir. 1990), the court found that the evidence created a factual dispute of whether the defendant acted against the plaintiff with the intent to interfere with the plaintiff's right of intimate association with her husband. In this case, no evidence was presented by the Petitioner to support a right of association claim. If one even reached the question of why Petitioner was terminated, it was not because of his being married to his wife. While it may be true that a plaintiff may state a substantive due process claim based upon a right of intimate association with a spouse, the Petitioner failed to produce any evidence to support such a claim as found by all three decisions of the Eighth Circuit.

CONCLUSION

Petitioner has not articulated any reason why this Court should exercise its discretion and grant his Petition For Writ of Certiorari in this case. To the contrary, grant of the Petition would call into question long-standing policies of this Court and the federal system to refrain from interfering with employment decisions of state bodies, and to avoid becoming super-personnel departments to review those decisions. These principles are firmly established and do not require reaffirmation by this Court. Certiorari should be denied.

Respectfully submitted,

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